IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

1. Deepak Chikna @ Deepu Vs. State of Raj.
(D.B. Criminal Appeal No.1013/2004)

2. Ashiq Ali & Others Vs. State of Raj.
(D.B. Criminal Appeal No.804/2004)

3. Maruf @ Maru Vs. State of Raj.
(D.B. Criminal Appeal No.803/2004)

4. Maroof @ Maru @ Shafi Mohammad Vs. State of Raj.
(D.B. Criminal Appeal No.0528/2006)

D. B. Criminal Appeals under Sec.374 (2) Cr.P.C. against the judgment dated 19-5-2004 in Sessions Case No.186/2001 passed by Shri Arun Kumar Pareek, RHJS, Additional Sessions Judge (Fast Track) No.1 Ajmer.

Date of Judgment: May 07, 2007.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA
HON'BLE MR. JUSTICE GUMAN SINGH

Mr. J.P.Sodhi] for the appellants.
Mr. G.S.Sodhi]
Mr. V.P.Yadav]

Mr. M.L.Goyal, Public Prosecutor for the State.

BY THE COURT: (PER HON'BLE Shiv Kumar Sharma,J.)

"Truth sits on the lips of dying man". This is the principle on which the evidence of dying declaration is admitted. The dying declaration of deceased Jai Kishan in the instant case was found acceptable by learned Additional Sessions Judge (Fast Track) No.1 Ajmer, and only on that basis the appellants, three in number, were convicted and sentenced as under:-

Appellant Deepak Chikna @ Deepu:
U/s.302 IPC:

To suffer imprisonment for life and fine of Rs.200/-, in default to further suffer simple imprisonment for ten days.

Appellants Ashiq Ali @ Akram Ali and Maroof @ Shafiq:
U/s.302/34 IPC:

Both to suffer imprisonment for life and fine of Rs.200/-, in default to further suffer simple imprisonment for ten days.

2. It is the prosecution case that on May 23, 2001 SHO Police Station Kotwali Ajmer recorded Parcha Bayan (Ex.D-1) of injured Jai Kishan admitted to JLN Hospital Ajmer at 2.40 AM, wherein he stated that at 1.45 AM Deepak @ Chikna came to his house and woke him up. At that time his son Vijay and his brother Ramchandra were in the house. Deepak Chikna told him that Advocate Shankar had met with an accident and was admitted to the hospital and Advocate Ajay Tripathi was calling him. When he (Jai Kishan) came down stairs he found outer door of the house broken. Deepak then told him that since no one opened the door, he had broken it. Out side the house Ashiq Ali and Maroof @ Shafiq were sitting on the scooter. He (Jai Kishan) then occupied the rear seat of the scooter and all of them proceeded. The scooter got halted near the house of Mohan Neta and he (Jai Kishan) was asked to get down of the scooter. Deepak then demanded explanation that even after charging money why his bail was not arranged. Ashiq Ali and Maru @ Shafiq then caught hold of him and Deepak inflicted knife blows on his person. Hearing hue and cry Mohan Neta came out of the house and informed the police. On that parcha bayan a case under sections 452 and 307/34 IPC was registered and investigation commenced. In the course of investigation Jai Kishan died and section 302 IPC came to

be added. After usual investigation charge sheet was filed. In due course the case came up for trial before the learned Additional Sessions Judge (Fast Track) No.1 Ajmer. Charges under sections 458, 364, 302 and 302/34 IPC were framed against the accused, who denied the charges and claimed trial. The prosecution in support of its case examined as may as 21 witnesses. In the explanation under Sec.313 Cr.P.C., the appellants claimed innocence. One witness in support of their defence was examined. Learned trial Judge on hearing final submissions convicted and sentenced the appellants as indicated herein above.

3. We have heard learned counsel for the appellants and learned Public Prosecutor and with their assistance scanned the material on record.

4. Injuries sustained by Jai Kishan were examined vide Injury Report (Ex.P-17) which reads as under:-

1. Incised wound on Lt. side abdomen 3cm x 1cm x muscle deep oblique
2. Incised wound on Epigastrium 4cm x 1cm x muscle deep
3. Incised wound 2 x 1cm x muscle deep below Lt.nipple.
4. Incised wound Lt. side chest 4 x 1cm x muscle deep oblique
5. Incised wound front of L. shoulder 2cm x 1cm x muscle deep.
6. Stab wound on Rt. hypocondrium 3cm x 1cm x ? oblique
7. Stab wound on umblical area 3cm x 1cm x ?
8. Stab wound on epigastic area 3cm x 1cm x ?
9. Incised wound L. side back 4 x 1cm x muscle deep
10. Incised wound on L. scapular 4 x 1cm x muscle deep
11. Incised wound on 4 x 1cm Rt. side back muscle deep
12. Incised wound back L. forearm 4 x 1cm x muscle deep.
13. Incised wound back of L.FA 6cm x 1cm x muscle deep.
14. Incised wound on L. thigh 6cm x 1cm MD.
15. I wound R. forearm 3 x 1cm x skin deep.

After Jai Kishan died, his dead body was subjected to autopsy. As per Post Mortem Report (Ex.P-18) drawn by Dr. Asutosh Srivastava (Pw.16) the cause of death was shock due excessive hemorrhage as a result of injuries to liver, transverse colon, jejunum.

5. Having closely scrutinised the material on record we notice that there is no eye witness to the incident and the only witness Mohan Lal Sharma (Pw.13), to whom injured Jai Kishan allegedly narrated the names of assailants immediately after the incident, did not support the prosecution case and was declared hostile. The only evidence therefore left with the prosecution was Parcha Bayan (Ex.D-1) of Jai Kishan recorded by Hanumant Singh IO (Pw.18), which was relied upon by learned trial court. We have therefore to examine as to whether the said dying declaration was true and voluntary.

6. A look at the testimony of Hanumant Singh IO reveals that he recorded Parcha Bayan of Jai Kishan in the Hospital. Even then he did not choose to record it in presence of doctor. Nor did he obtain certificate from doctor about the mental state of Jai Kishan. In his cross examination he deposed thus:-

> "मैंने डयूटी डाक्टर से बयान देने योग्य फिट है का कोई सर्टिफिकेट प्राप्त नहीं किया। मैंने पर्चा बयानों पर प्रमाणीकरण डयूटी डाक्टर के हस्ताक्षर नहीं कराये।"

7. Dr. R.K.Mathur (Pw.15), who examined Jai Kishan immediately after his admission to the hospital, however deposed that there were as many as 15 cuts and penetrated wounds on the person of Jai Kishan and general condition of patient was poor and he was not in senses. In his

cross examination, he stated as under:-

> "यह बात सही है कि पी-17 में विशेष रूप से यह अंकित नहीं है कि मजरूब होश मे था या नहीं था जी सी पूअर का आशय यह है कि वह होश में नहीं था। शोक की स्थिति में था।"

8. Even the brother and son of Jai Kishan deposed that Jai Kishan was unconscious. Ram Chandra (Pw.1), brother of Jai Kishan, in his cross examination stated thus:-

> "हम अस्पताल पहूंचे तब जय किशन बेहोश था।"

Vijay (Pw.8), son of Jai Kishan, also stated that Jai Kishan was unconscious and it was his mother who put the signatures of Jai Kishan on the report:-

> "मेरी मम्मी के हस्ताक्षर जिस रिपोर्ट पर पुलिस ने कराये वह अस्पताल मे लिखी गई थी। मम्मी ने उस रिपोर्ट पर मेरे पिता जय किशन के हस्ताक्षर किये थे। प्रदर्श डी1 पर ए से बी हस्ताक्षर मेरी मम्मी ने अस्पताल में नहीं किये थे। मैंने मेरे पिताजी से यह नहीं पूछा कि झगडा हूआ है या नहीं क्योंकि वे बेहोश थे।"

Lajwanti, wife of Jai Kishan, who appeared as defence witness (Dw.1) admitted that on Ex.D-1 she wrote the name of Jai Kishan in English:-

> "मैंने रिपोर्ट डी-1 पर जय किशन का जो नाम लिखा वह मैंने अंग्रजी में लिखा था। प्रदर्श डी-1 पर मैंने सिर्फ जयकिशन लिखा था मैंने उसको पढा नहीं था।"

9. Even Mohan Lal Sharma (Pw.13), who had seen injured Jai Kishan lying in front of the house, deposed that he saw Jai Kishan lying unconscious:-

> "मेरे मकान के सामने नक्शा मौका बनाया उसके दो दिन पहले एक आदमी घायल अवस्था में पडा था जिसके खून आ रहे थे। वह बेहोश था मैने रात मे पुलिस को फोन किया था। वहां से एक चाकू पुलिस ने जप्त किया था"

10. Having closely analysed the testimony of Hanumant Singh we

find that alleged Parcha Bayan (Ex.D-1) was in the hand writing of Mahaveer Singh Constable and Hanumant Singh IO only put his signatures. We also notice that time 2.45 AM was initially noted down which was subsequently changed as 3.05 AM. Even on Ex.D-1 time mentioned below the signatures of Hanumant Singh and time shown after the details of "पुलिस कार्यवाही" are in different ink, i.e. green and blue. In the formal FIR (Ex.P-20) initially 2.45 AM was mentioned but it was subsequently changed by over-writing as 3.05 AM. All these facts create doubt about the presence of Hanumant Singh in the Hospital at the relevant time. It is inexplicable as to why Mahaveer Singh Constable, an important witness, was not examined at the trial. Testimony of Lajwanti (Dw.1) pursuaded us to draw the conclusion that Jai Kishan was not in a fit state of mind to give the statement and to put his signatures. It was Lajwanti, who put signatures of Jai Kishan in English on being asked by the police.

11. At this juncture, we deem it appropriate to refer the principles governing acceptability of dying declaration, laid down by the Apex Court in the various judgments:-

(i) The Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination (K. Ramchandra Reddy Vs. Public Prosecutor (1976)3 SCC 618).

(ii) Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence. (Rashid Beg Vs. State of MP (1974)4 SCC 264).

(iii) A dying declaration which suffer from infirmity cannot

form the basis of conviction. (Ram Manorath Vs. State (1981)2 SCC 654).

12. We also find that I.O. flouted the mandate of Rule 6.22 of the Rajasthan Police Rules,1965, which provides thus:-

> "6.22 Dying declaration (1) A dying declaration shall, whenever possible, be recorded by a Magistrate.
> (2) The person making the declaration shall, if possible, be examined by a medical officer with a view to ascertaining that he is sufficiently in possession of his reason to make a lucid statement.
> (3) If no Magistrate can be obtained, the declaration shall, when a gazetted officer is not present, be recorded in the presence of two or more reliable witnesses unconnected with the police department and with the parties concerned in the case.

13. In Bashir Vs. State 1994(2) Rajasthan Law Reporter 30, this court held that whenever the dying declaration is taken to be the sole basis of conviction and sentence, strict compliance of Rule 6.22 of the Police Rules in letter and spirit must be ensured.

14. In the case on hand, the mysterious circumstances under which alleged dying declaration was recorded create doubt about its genuineness. The alleged dying declaration in our considered opinion suffers from infirmities and it could not have been made the basis of conviction. The appellants therefore are entitled to benefit of doubt.

15. For these reasons, we allow the appeals and set aside the impugned judgment dated May 19, 2004 of the learned Additional District and Sessions Judge (Fast Track) No.1, Ajmer. We acquit the accused Deepak Chikna @ Deepu of the charge under section 302 of the Indian

Penal Code and appellants Ashiq Ali @ Akram Ali and Maroof @ Maru Shafik Mohammad of the charge under section 302/34 IPC. Appellants Deepak Chikna @ Deepu, Ashiq Ali @ Akram Ali and Maroof @ Maru Shafik Mohammad, who are in jail, shall be set at liberty forthwith, if they are not required to be detained in any other case.

(Guman Singh),J. (Shiv Kumar Sharma)J.

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